United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEYWARD MARTIN,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Respondent.

B

P/s

DOCKET NO. 76-2079

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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18 U.S.C. #1708

Theft or receipt of stolen mail matter generally

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted--

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. #2114

Mail, money or other property of United States

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

18 U.S.C. Rule 31(c)

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

18 U.S.C. Rule 32(a)(1)

Sentence and Judgment

(a) Sentence

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

PRELIMINARY STATEMENT

Petitioner is presently incarcerated in the Federal Penitentiary in Atlanta, Georgia, serving a 25 year sentence, following his conviction in the United States District Court for the Eastern District of New York (Costantino, J.), on August 15, 1972, of armed robbery of a post office, in violation of T. 18, U.S.C., §2114. Petitioner was also convicted of unlawful possession of stolen mail, in violation of Title 18, United States Code, §1708. For this offense, he was given a five year sentence, to run concurrently with the sentence imposed by Judge Costantino under §2114. Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit, without opinion, on March 15, 1973.

In March of 1975, petitioner moved pro se in the District Court, pursuant to T. 28, U.S.C., §2255, for an order to correct his sentence. In support of his motion, petitioner alleged that he had been denied an opportunity to speak in his own behalf at the time of sentencing. See Rule 32(a) of the Federal Rules of Criminal Procedure. Petitioner also appeared to claim that he had been improperly sentenced because Judge Costantino and petitioner's counsel allegedly failed to understand that when sentencing petitioner under §2114, the Court had the option of placing petitioner on probation. In a Memorandum and Order filed March 26, 1975 Judge Costantino denied petitioner's motion, pointing out that petitioner had in fact been given an opportunity

to speak in his own behalf at sentencing and noting that the Court had understood the sentencing requirements and options under T. 18, U.S.C., §2114.

Following the denial of his motion, petitioner submitted a pro se motion for reconsideration in the District Court, again alleging the same two grounds upon which he had relied in his original petition. This motion was denied by Judge Costantino in a Memorandum and Order filed April 24, 1975.

After the denial by Judge Costantino of his motion for reconsideration, petitioner appealed pro se to the Court of Appeals, asking for leave to proceed in forma pauperis and for the appointment of counsel. In his appeal, petitioner relied upon the same claims which he had asserted in the District Court.

On September 3, 1975, the Court of Appeals ordered that Petitioner's case be remanded to the District Court "for a hearing on appellant's sentencing and jury charge issues." At the same time, petitioner's motion for leave to proceed in forma pauperis and for the appointment of counsel was denied as moot.

The hearing ordered by the Court of Appeals was held on April 13, 1976 and on June 1, 1976 Appellant's petition to be resentenced was denied (Costantino, J.). This is an appeal from the order of June 1, 1976.

STATEMENT OF FACTS

At 5;55 P.M., on March 23, 1972, John Conley, a motor vehicle operator employed by the Post Office, and John Carter, a dispatch clerk at the Rochdale Village Postal Station, opened the rear door of the Rochdale Village Postal Station to transport parcels of mail to Conley's waiting truck. An individual subsequently identified as petitioner, wearing a letter carrier's Eisenhower jacket and carrying a letter carrier's sack attempted to squeeze by Conley and Carter. He withdrew a sawed-off shotgun from the sack he was carrying and forced both men into the interior of the post office. A second male individual, unidentified, wielding a .38 caliber pistol, entered behind petitioner. Both intruders then escorted the two postal employees to the front of the post office work area, behind the public service counter, where Conley and Carter were forced to lie face down and their hands and feet were tied behind their backs.

The robbers next encountered Christianna Jones, a clerical worker, and the station superintendent, Reuben Carter. Mrs. Jones was herded, at gun point, by the unidentified robber to the locale of Conley and John Carter, where she too was made to lie down and was bound.

Reuben Carter, at the insistence of petitioner, showed petitioner where the day's receipts were located and then, at petitioner's demand, attempted to open a safe contained in a vault. Although unable to open the safe, Carter was able to

comply with Petitioner's command to open a locked cabinet and to hand over to petitioner 600 serialized, postal money order blanks. Petitioner then demanded to know where the machine used to print the face amount of the money orders was located (this was a Friden print-punch order machine). Carter was then taken from the vault and tied upon the floor by the second robber, who by that time had obtained a sack containing the registered mail and the day's receipts. The sack was thereupon cut open and its contents removed. The robbers then fled the scene.

An inspection of the premises after the victims were freed disclosed that in addition to the contents of the registered mail sack and the 600 postal money order blanks, the Friden print-punch machine, which was last seen in the hands of one of the robbers by both John Carter and Christianna Jones, and a .38 caliber pistol, last seen after closing hours in an open safe on the floor of the work area, were also missing.

At trial all four postal employees, John Carter, John Conley, Reuben Carter and Christianna Jones, identified petitioner as the shot-gun wielding robber.

Also testifying for the Government was John Iachello, a New York City Police Officer. Officer Iachello testified as to his arrest of petitioner approximately two hours after the robbery and his recovery from petitioner's car of a quantity of mail identified as having been stolen in the robbery.

Petitioner called two alibi witnesses, Lilly Haigler, his wife, and George Jennette. Haigler and Jennette, both testified that they were with petitioner from between 5:30 and 6:00 P.M. on March 23, 1972. Jennette further testified that he and petitioner left Haigler shortly after 6:00 P.M. and that he remained with petitioner until about 6:50 P.M. Petitioner took the witness stand in his own behalf. He denied leaving Brooklyn on March 23, 1972 and denied robbing the Rochdale Village Postal Station. Petitioner's version of his activity on the day in question coincided with the testimony of Lilly Haigler and George Jennette. A jury returned a verdict finding petitioner guilty of a violation of 18 U.S.C. 2114 and of 18 U.S.C. 1708. Petitioner was sentenced to a term of incarceration of twenty-five (25) years which he is currently serving.

QUESTIONS PRESENTED

1. Was the Appellant given an opportunity to speak in his own behalf at the time of sentence in compliance with Title 18 Rule 32(a)(1) of the Federal Rules of Criminal Procedure?

2. Was the District Court's erroneous charge with respect to the meaning of the word "Jeopardy" plain error?

POINT I

THE APPELLANT WAS NOT GIVEN AN OPPORTUNITY TO SPEAK IN HIS OWN BEHALF AT THE TIME OF SENTENCE IN COMPLIANCE WITH TITLE 18, RULE 32(a)(1) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Title 18, Rule 32(a)(1) of the Federal Rules of Criminal Procedure states:

> "(1) Imposition of Sentence...
>
> Before imposing sentence, the Court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment..."

At Appellant's hearing on April 13, 1976 concerning the sentencing procedures, John Corbett, Esq., Appellant's trial counsel stated that at the time of sentence he asked Mr. Martin if he had anything to say and that Mr. Martin replied that he did not. (Minutes p.9). At the same hearing, Mr. Corbett also stated that he knew of the court's authority to sentence Appellant to a suspended sentence or a term of probation, but that counsel "never believed that he would get probation or a suspended sentence if convicted, and I never advised him of that." (Minutes of April 13, 1976, pp. 16-17)

In its Memorandum and Order dated June 1, 1976 the District Court (Constantino, J.) stated that at the time of sentencing, it was aware that a suspended sentence or a period of

probation could be imposed but that neither would have been appropriate in this case. (Order, pp. 5-6)

Appellant, although technically having been given an opportunity to speak, was not given an opportunity to speak in mitigation of punishment as required by 18 U.S.C. Rule 32(a)(1). Although defense counsel and the court knew that a suspended sentence or probation were theoretical possibilities, no one told the defendant of this possibility. It was clear to all parties present, including the defendant, that a jail term would be imposed for his violation of 18 U.S.C. 2114, Postal Robbery. However, Appellant was also being sentenced for a violation of 18 U.S.C. 1708, Theft of Stolen Mail, the second count of the same indictment, for which he received a five (5) year sentence to run concurrently with the twenty-five (25) year sentence.

It was, therefore, possible for the court to sentence the defendant to five (5) years imprisonment under the second count of the indictment and a five (5) year term of probation to run consecutively. In that way, the defendant would have been sent to prison for his crime, but would not have received the harsh twenty-five (25) year sentence which is excessive in light of Appellant's prior record, which consists of a traffic violation for which he served one hundred (100) days in prison.

Had Appellant been aware of such an option, he surely would have brought it to the attention of the court, and surely would have asked counsel to request such a sentence. Counsel could have requested such a five (5) year prison sentence without "insulting the intelligence of the court." (Minutes of April 13, 1976, P.15) especially in light of Appellant's prior record and other mitigating circumstances, such as the fact that Mr. Martin was married and had a young child.

In United States v. Donovan, 242 F.2d 61 (2nd Cir., 1957), a case also involving a violation of 18 U.S.C. §2114 with the twenty-five (25) year sentence, this court stated:

> "...Had he (trial judge) been aware of this (the possibility of a suspended sentence or probation), we cannot say that he might not have chosen to impose the possibly inadequate sentence of five years on the conspiracy count and to suspend sentence on the other, rather than impose and not suspend the possibly excessive sentence of twenty-five (25) years he thought mandatory. Appellants are entitled to an unfettered consideration of these alternatives..." 242 F.2d at p.64

It is clear, as stated by Mr. Corbett, that Appellant was not advised of the possibility of a suspended sentence of probation. Further, at the time of sentence, although the court permitted Appellant an opportunity to speak, said opportunity was not offered for the purpose of requesting mitigation of punishment because the court stated:

"Will you understand the

> sentence is absolutely mandatory..." (Sentencing Record, page 4)

and because Appellant was not informed that there were alternatives to incarceration.

For the above reasons, although Appellant was given an opportunity to speak at the time of sentence, this offer was illusory, and he was not given an opportunity within the meaning of 18 U.S.C, Rule 32(a).

POINT II

THE DISTRICT COURT INCORRECTLY CHARGED THE JURY WITH RESPECT TO THE MEANING OF THE WORD "JEOPARDY" AND SUCH ERROR WAS PLAIN ERROR

The Memorandum and Order (Costantino, J.) dated June 1, 1976 concedes that the charge to the jury incorrectly stated that "to put in jeopardy (means) that by the use of a weapon, you expose a person to fear of his life or to a risk of death." (p.7). Citing United States v. Donovan 242 F.2d 61, 63 (2nd Cir., 1957), the Court states that the correct charge would be that placing a life in jeopardy means placing a person in danger of death rather than putting him in fear of death. Since it is conceded that the jury charge was erroneous, the issue before this court is whether such error was harmless or of such magnitude as to require a reversal.

In United States v. Donovan, (supra) the defendant was also charged with a violation of 18 U.S.C. 2114. charge similar to the one given in the case at bar was held to be harmless. However, there were two important factors which influenced the court in its holding. First, the incorrect charge was that requested by Donovan's counsel. Secondly, there was no doubt that the postal employee's life was actually in danger. These factors distinguish Donovan, supra, from the instant case. In the case at bar, Appellant's counsel did not request the incorrect charge, nor did counsel lure the court into a "trap" for the purpose of obtaining a reversal at a later time.

Therefore, on its facts, Mr. Martin's case differs in this respect.

The District Court stated in its Memorandum and Order of June 1, 1976, that "(i)n the case at bar, there can be no doubt that the postal employees' lives were actually in danger "(p.7). Appellant respectfully disagrees with this contention. It is a question of objective fact, to be determined by the jury, whether the postal employees'lives were placed in jeopardy. The postal employees testified at trial that the Appellant displayed a shotgun. There was no testimony that the weapon had been fired nor that it was loaded and operable. Although the testimony may give rise to a presumption that the gun was loaded, it is a presumption that the jury may infer. It is incorrect to state that there is no doubt that the postal employees' lives were in danger, and there is no way to determine on which basis the jury arrived at its verdict, nor even whether the jury reached the question of whether the weapon was loaded and/or operable.

The District Court's Memorandum also states that defense counsel waived the jury instruction as to the lesser included offense as part of its trial strategy (Memorandum, p.10). Although counsel failed to request a jury instruction on the lesser included offense, and did not object to the omission of such an instruction from the charge, the omission when taken together with the incorrect definition of jeopardy given to the jury increased the magnitude of the court's error to plain error.

18 U.S.C. Section 2114 states a greater crime and a lesser crime, and the lesser crime by definition is a lesser-included offense of the greater crime. On the

facts of this case, the petitioner was entitled to have the jury receive a charge concerning this lesser-included offense.

18 U.S.C. §2114 states:

> §2114. Mail, money or other property of United States
>
> Whoever assaults any person having lawful charge control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

The National Commission on Reform of Federal Criminal Laws defined a lesser-included offense as one which is established by proof of the same or less than all the facts required to establish the commission of the offense charged, United States v. Whitaker 447 F.2d 314 (1971, D.C. Cir.,).

Another definition was stated by the 8th Circuit Court of Appeals in United States v. Beneke 449 F2d 1259 (1971) when it stated at page 1262:

> "To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser. James v. United States 9 Cir., 16 Alaska 513, 238 F.2d 681, 683. Stated differently, the offense must not require some additional element not needed to constitute the greater offense. Waker v. United States, 1 Cir., 344 F.2d 795, 798, Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969), Accord, Theriault v. United States, 434 F.2d 212, 214 (5th Cir. 1970); Larson v. United States, 269 F.2d 80, 81 (10th Cir. 1961)."

By the very language of 18 U.S.C. §2114, the first offense stated is a lesser-included offense of the greater offense. The language states that the greater offense only occurs in instances of effecting the lesser offense. However, the case of Brooks v. United States 223 F.2d 393 (1955, 10th Cir.) makes it clear that this statute states only one crime with two parts. By the holding of Brooks v. United States, supra, a person cannot be convicted and sentenced under both phrases of the statute for the same incident and this principle is also consistent with the definition of a lesser-included offense.

The charge in question was in error because the defendant was entitled to a charge upon the lesser included offense as of right. Rule 31 (c) of the Federal Rules of Criminal Procedure states:

> "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

In Sansone v. United States 380 U.S. 343, 13 L. Ed.2d 882, 85 S.Ct. 1004 (1965), the Supreme Court, after quoting this rule, stated:

> "Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it ...(is) entitled to an instruction which would permit a finding of guilt of the lesser offense' Berra v. United States, supra, 351 US at 134, 100 L.Ed at 1017. See Stevenson v. United States 162 US 313, 40 L.Ed 980, 16 S. Ct. 839. But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra; Sparf v. United States, 156 US 51, 63-64 39 L.Ed 343, 347, 348, 15 S.Ct 273. In other words, the lesser offense must be included within but not on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra, Sparf v. United States, supra, 156 US at 63-64, 39 L.Ed at 347,348."

In 18 U.S.C. §2114 conviction upon the greater offense requires a finding by the trier of fact that the person having custody of the mail was wounded or that his life was put in jeopardy by use of a dangerous weapon. A conviction for the lesser offense does not require a finding of these facts. In the case at bar, the factual issue of whether the postal workers' lives were placed in jeopardy must be determined by the jury. Therefore, this case presents an issue where "the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." Sansone v. United States,(supra),

In the case at hand, there is a genuine conflict of evidence as to whether the postal employees' lives were put in jeopardy, as shown by the petition in forma pauperis of petition at page 9. Although the jury did find the defendant guilty of the greater offense, which by definition makes him guilty of the lesser offense, if given the opportunity, they might have only found the petitioner guilty of the lesser offense. The Supreme Court expressed this same idea when it stated:

> "Moreover it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction--in this

> context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. (emphasis by the court)"
>
> Keeble v. United States 412 U.S. 205, 212, 213 (1973), 93 S.Ct. 1993, 1997, 1998, 36 L.Ed 2d 884

It is the contention of petitioner that this result may have occurred in the case at bar. While the evidence was overwhelming that petitioner did commit some crime, there was a reasonable doubt as to whether he committed the crime for which he was convicted. However, the jury, being unaware of the severe penalty to be imposed, convicted petitioner of the only crime charged by the court.

It has been held by the 6th Circuit Court of Appeals that the Court of Appeals could not consider a claim of error in the court's charge unless there was an objection to the charge by the defendant's counsel or unless the charge was so prejudiced as to lead to a miscarriage of justice. United States v. Foster 407 F.2d 1335 (1969)cert. den. 396 U.S. 862, U.S. v Vigi, 515 F.2d 290 (1975).

In the case at bar, petitioner respectfully submits that the court's charge was so prejudicial as to lead to a miscarriage of justice, especially when viewed in light of

the quoted portion of Keeble v. U.S. (supra) and that upon review, the charge may properly be found to be in error even though petitioner's counsel did not request it nor object to the charge given. The actual facts show that petitioner was convicted of a crime for which a mandatory twenty-five (25) year sentence was imposed. Had the correct charge been given, the defendant could have received a maximum term of incarceration of ten (10) years, and he might have received a term of probation only or a small term of incarceration, rather than the mandatory twenty-five (25) years. Petitioner contends that because of the great disparity in prison terms imposed under the different sections of 18 U.S.C. §2114, the failure to charge the lesser-included offense to the jury was "so prejudicial as to lead to a miscarriage of justice" in this case and permits the court to review the sentence on its own.

Although counsel stated that the issue of jeopardy need not be charged, trial counsel's reasonable expectation was that the court would properly instruct the jury as to the definition of jeopardy. It is respectfully submitted that not merely because, but in spite of defense counsel's strategy, the charging of the incorrect definition of jeopardy was such plain error as to require a reversal of the conviction.

CONCLUSION

The order appealed from should be reversed, the sentence imposed should be vacated and a new trial should be ordered.

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